**Teresa Coal Company, Inc.** *and* **Roy Delong.** Case 9-CA-15265

November 18, 1981

## DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On June 30, 1981, Administrative Law Judge Claude R. Wolfe issued the attached Decision and on July 8, 1981, an erratum thereto in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Teresa Coal Company, Inc., Sidney, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

## DECISION

### STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge: This case was ably heard by both parties before me in Huntington, West Virginia, and Pikeville, Kentucky, on January 8 and March 25 and 26, 1981, pursuant to charges filed on April 30, 1980, and the complaint issued June 4, 1980. The complaint alleges violations of Section 8(a)(1) of the Act, as amended, consisting of the discharge of eight coal miners because they engaged in protected concerted activity, and a threat to discharge employees if they refused to enter the coal mine involved herein.

Respondent denies that it has committed the unfair labor practices alleged. Both parties filed post-trial briefs.

Upon the entire record and my observations of the demeanor of witnesses as they testified, I make the following:

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a Kentucky corporation with offices and places of business in Canada and Sidney, Kentucky, where it has been engaged in the mining of coal. During the 12 months preceding the issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, purchased and received at its Canada, Kentucky, facility goods and materials valued in excess of $50,000 directly from points outside the State of Kentucky. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Facts Found*[1]

The coal seam at Respondent's mine is reached via an entrance way approximately 54 inches high at its lowest point and 18 to 20 feet wide extending about a half mile, or slightly less, from the outside entry to the work station. Prior to the coming of Section Boss Elmer Coyer in January 1980,[2] the men negotiated the entry passage by either walking in or riding in the bucket of a motorized scoop. The bucket measures about 6 by 9 feet, and the entire crew of 12 or 13 men would be carried in the scoop at one time. Scoops are commonly used for such a purpose in area mines, and Ray Chapman, district supervisor, Kentucky Department of Mines and Minerals, convincingly testified that so long as scoops are in good condition they are considered legally safe for usage in transportation of workers underground. Chapman's office has received no complaints, or issued any citations, or found any violations in Respondent's use of scoops. There is no evidence that any employee has suffered any physical injury while riding the scoop.

On those occasions when employees walk into the mine they are paid for the time thus spent, with overtime pay for any portion of that time over and above regular working hours.

Shortly after Elmer Coyer came to the mine in January, he instituted the use of a mantrip to convey workers in and out of the mine. A mantrip is a rectangular conveyance measuring about 8 by 20 feet. The one in use at Respondent's mine was characterized by some witnesses as a sled, from which I conclude it was on runners, pulled by the scoop.

The employees rode in the mantrip until about 2 weeks prior to April 17, when it became unusable because the access road was so wet and muddy, with holes in the roadway, that the mantrip could not traverse it without becoming stuck. The condition of the road was

[1] With minor exceptions, there is substantial agreement among the witnesses regarding the relevant facts.

[2] All dates are in 1980.

such that the scoop also occasionally became stuck in the roadway or could only progress halfway in. In either case the men had to get out and walk.

After the poor road conditions made it impossible to use the mantrip, the men either rode the scoop in and out or walked. During this 2-week period, the second-shift men had several discussions among themselves concerning their complaints about the scoop. The primary topic of discussion was the possibility of injury to men riding in the scoop if it should rise up sufficiently to push them out against the ceiling. The evidence establishes that on frequent occasions the scoop would start to rise toward the ceiling, which caused the riders to shout to the operator who then took appropriate action to lower it. It appears that the scoop's trailing edge could rise at least 24 inches, leaving only about a 30-inch clearance for the seated men. I conclude it would be quite possible for a sitting man of average height to be pushed against the ceiling in the event of a 24-inch rise. Coyer[3] concedes that he heard the men complain of being frightened by the propensity of one of the two scoops available to rise without notice due to a stuck control lever. It also appears that the scoop bucket was sometimes caused to rise by the operator's maneuvering over the various dips and bumps in the road. The men were also concerned about the possibility the scoop ejector might accidently push them off the back edge of the scoop.[4] The men also complained, and advised Coyer, that they were afraid they would be unable to get out of the mine quickly if they got hurt. This concern was exacerbated by the fact that two other employees had been injured in the mine within 2 weeks of April 17 and had to be carried out by men on foot, a rather difficult and time-consuming project considering the height of the passage. This latter concern helps to explain the employees' later rejection of the opportunity to walk in to work.

At the end of their shift on April 17, about 6:30 p.m., all 13 men on the second shift talked to Coyer in a group, and told him that the roadway needed repairing and if it was not fixed so they could ride in the mantrip they would not ride the scoop on April 18. I conclude this ultimatum was immediately precipitated by the fact that the scoop bucket had risen on the way out that evening.

Coyer promised to speak to Lacy Walters, who was then Respondent's president but has since severed this connection. I credit Coyer that he spoke to Walters that evening and told him they needed to repair the roadway and operate the mantrip because the scoop was crowded. Coyer, who himself had once fallen out of the scoop as had another employee, had previously made similar requests to Walters, but the road was not yet repaired on April 17.

On April 18, the second-shift employees gathered at the mine shortly before the 2:30 p.m. starting time. The roadway was not repaired, nor was the mantrip there. The men met with Coyer and said that they were not going to ride the scoop because it was dangerous. Coyer then went and talked to Walters. I credit Bill Sparks, Respondent's office manager, that Walters told Coyer to tell the men they could either ride the scoop, walk in, or "go to the house" (a localism for "go home"). Coyer delivered this message. The men offered to remain and work if they could work at repairing the roadway. This offer was declined, and eight of the employees left,[5] after telling Coyer they would be back on Monday, April 21. The five second-shift employees who did not leave were put to work repairing the road.

David Thornsbury testified that, as he was leaving, he encountered Walters who told him that if the men walked off the hill they would not have a job. Walters' version was that he told Thornsbury and a couple others that if they went home they quit as far as he was concerned. Both versions convey basically the same message that employees who left would be separated, but I credit the version of Thornsbury, a more impressive witness than Walters. Office Manager Sparks agrees with Walters that the eight who left were no longer employees after they walked off on April 18 because by leaving they quit.

All eight returned at the beginning of their shift on April 21.[6] I find they were prepared to go to work and had their work clothes and equipment with them. They met with Walters and Sparks because they heard from other employees that they had been fired. Walters told them he could not let them go to work because they had quit. The men countered that they had not quit and were ready to go to work. Walters repeated they had quit and he could not let them go to work if he wanted to, and the men persisted that they were fired. The "quit" versus "fired" argument went on for a few minutes until Walters told them to go to the Board if they thought they had a case. They then left. No more than two new employees had been hired prior to the return of the eight on April 21.

Prior to the second shift "going to the house" on April 18, the first shift walked out on April 18 protesting the nonpayment of a production bonus. Two first-shift employees quit rather than go back in. Contrary to Respondent, the evidence does not convincingly show more than a vague suspicion that the second shift may have left for the same reason, and the clear preponderance of the evidence shows they left for the reasons expressed to Coyer on April 17 and 18.

### B. *Concluding Findings*

When the employees spoke to Elmer Coyer on April 17 and 18 protesting the use of the scoop for transportation, and, in effect, demanding the road be fixed and the mantrip be put in service before they entered the mine, they were acting concertedly in pressing a grievance of concern to them all. That concerted action was clearly protected because the method of transportation in and out of the mine is clearly a condition of employment.

[3] Coyer is no longer associated with Respondent.

[4] The scoop is a very slow moving vehicle, and its speed was not discussed as a factor by the employees.

[5] Roy Delong, Wade Thacker, David Maynard, David Thornsbury, Larry Smith, Steven Morris, Jerome Newsome, and William F. Scott.

[6] This account of the events of April 21 is a fair summary of the complementary credible portions of the testimony of Roy Delong, William Scott, David Thornsbury, Larry Smith, Jerome Newsome, and Bill Sparks. Testimony to the contrary is expressly discredited.

The evidence with respect to the hazards of riding the scoop and the possible consequences of any delay occasioned by the necessity of carrying out an injured employee on foot establishes that the employees' action in protesting these conditions and requesting road repair and the return to use of the mantrip as conditions precedent to their entering the mine was not indefensible.[7] The repair of the road which would permit the use of the mantrip was certainly not an unreasonable request, as shown by Respondent's immediate start of that repair on April 18.

The employees have a statutory right to withhold their services in support of their grievance, and Respondent could not lawfully discharge them because they continued adamant in that refusal to work absent a remedy for their complaint,[8] nor could Respondent lawfully confront them with the choice of abandoning their statutory right or being terminated as employees. These alternatives were placed before the employees on April 18 by Coyer, pursuant to Walters' instructions, and plainly conveyed that discharge was imminent if they did not abandon their protected concerted withholding of services. I find this amounts to a threat of discharge violative of Section 8(a)(1) of the Act, and although not specifically alleged in the complaint it is fairly encompassed by complaint allegations, was fully litigated, and is intimately related to the subject matter of the complaint and the underlying charge.[9] Similarly, the statement of Lacy Walters to David Thornsbury that the men would have no job if they left was a threat of discharge for engaging in protected concerted activity, and violated Section 8(a)(1) of the Act.

Although Respondent would have it that the eight employees voluntarily quit on April 18 when they "went to the house," I cannot agree. Respondent's view that the men were given reasonable alternatives, particularly that of walking in on paid time, and therefore voluntarily quit when they left, is understandable, but is in error. There is no requirement in the statute or precedent that I have found requiring employees to abjure a colorable grievance merely because the employer presents an alternative arguably reasonable but not acceptable to them.

The men did not quit on April 18, but were in fact terminated on that date. That they had no intention of quitting is evidenced by their advice to Elmer Coyer that they would return on April 21 and by their return on that day ready to work. Moreover, the aforementioned threats of Coyer and Walters, together with the statements of Sparks and Walters that the men ceased to be employees when they left on April 18, warrant a conclusion that Respondent implemented its threats of termination because the eight employees continued to withhold their services. I find and conclude that Respondent violated Section 8(a)(1) of the Act by discharging Roy Delong, Wade Thacker, David Maynard, David Thornsbury, Larry Smith, Steven Morris, Jerome Newsome, and William Scott on April 18[10] because they engaged in protected concerted activity. This finding is based on and fully consistent with the teachings of the Supreme Court in *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). Respondent's reliance on *G. H. Reed and G. A. Reed, d/b/a Wind River Logging Company* v. *N.L.R.B.*, 430 F.2d 331 (10th Cir. 1970); and *N.L.R.B.* v. *Fruin-Colnon Construction Co. and Utah Construction and Mining Co., a Joint Venture*, 330 F.2d 885 (8th Cir. 1964), both denying enforcement of Board orders, is misplaced because both are inapposite on their facts; the issue in *Fruin-Colnon* is the applicability of Section 502 of the Act to a strike in violation of a collective-bargaining agreement; and nothing is more firmly established than the proposition that administrative law judges must follow Board precedents until the Board or the Supreme Court overrules them.[11]

I further find that Respondent violated Section 8(a)(1) of the Act by refusing the discharged employees reinstatement when they attempted to return to work on April 21. I view this as a continuation of the initial unlawful discharge and an effort to further perfect it. Walters' statement that he could not let them go to work if he wanted to constitutes an admission that he did not want to. The record requires a conclusion that the only discernible reason that he would not want to take them back was their concerted activity, all of which buttresses my original conclusion of unlawful discharge on April 18.

### III. THE REMEDY

In addition to the usual cease-and-desist order and the posting of appropriate notices, my recommended Order will require Respondent to offer unconditional reinstatement to the eight employees discharged on April 18 to their former jobs, or substantially equivalent employment if those jobs no longer exist, and make them whole for all wages lost by them as a result of their unlawful discharge, such backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By threatening its employees with discharge because they engaged in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

3. By discharging and refusing to reinstate Roy Delong, Wade Thacker, David Maynard, David Thornsbury, Larry Smith, Steven Morris, Jerome Newsome,

[7] This does not mean the conditions complained of were objectively unsafe, which I need not determine inasmuch as this case does not raise a question cognizable under Sec. 502 of the Act, but is, rather, concerned solely with the concerted presentation of a grievance and the exercise of the right to cease work in support thereof.

[8] *Ontario Knife Company*, 247 NLRB 1288 (1980).

[9] *Ackerman Manufacturing Company*, 241 NLRB 621 (1979).

[10] The complaint alleged April 21 as the date of discharge. I granted a motion to conform the pleadings to the proof insofar as minor variations in names and dates are concerned, and the complaint allegation of discharge "On or about April 21, 1980," is sufficient in itself. *Omico Plastics, Inc.*, 184 NLRB 767, 770 (1970).

[11] *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963).

[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

and William Scott because they engaged in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[13]

The Respondent, Teresa Coal Company, Inc., Sidney, Kentucky, its agents, officers, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to discharge employees because they engage in protected concerted activities.

(b) Discharging or refusing to reinstate employees, or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of their employment, because they engage in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions to Roy Delong, Wade Thacker, David Maynard, David Thornsbury, Larry Smith, Steven Morris, Jerome Newsome, and William Scott, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, in the manner set forth in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at Respondent's place of business in Sidney, Kentucky, copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[13] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

WE WILL NOT threaten our employees with discharge because they engage in concerted activity protected by the National Labor Relations Act.

WE WILL NOT discharge or refuse to reinstate any of our employees, or in any other manner discriminate against them in regard to their tenure of employment or other term or condition of their employment because they engage in concerted activity protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Roy Delong, Wade Thacker, David Maynard, David Thronsbury, Larry Smith, Steven Morris, Jerome Newsome, and William Scott immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, without prejudice to their rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered by reason of our unlawful discrimination against them, with interest computed thereon.

TERESA COAL COMPANY, INC.